No. 3543

In the United States Circuit Court of Appeals

For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Brief of Plaintiff in Error on Motion to Amend Judgment

RICHARD H. JOHNSON and
CAREY H. NIXON,
Attorneys for Plaintiff in Error.

The Statesman Shop, Boise, Idaho.

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Plaintiff in Error has filed a motion to modify or amend the order or judgment of this Court herein, to the extent only, of directing the District Court to enter a judgment in favor of plaintiff in error for the liquidated amount of the damages, in lieu of granting a new trial.

The case was tried by the Court and there was no dispute as to the facts, the only defenses raised and argued were as to the construction and effect of the

conditions contained in the telegraph blank as applied to the facts of the case, and whether such limitations applied to a case of gross negligence, etc.

The principle is the same as was applied by this Court in Irvine v. Angus, 35 C. C. A. 501, 93 Fed. 629, where the facts were agreed upon. On page 635, this Court said:

> "All of the material facts having been agreed upon by the parties at the trial, as shown by the bill of exceptions, there is no necessity for a new trial of the action. In accordance with the views expressed in this opinion, the judgment will be reversed, and the cause is remanded to the Circuit Court, with directions to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of $15,190.60, with legal interest thereon from May 21, 1884, and costs."

This was the method followed by this Court in the cases against telegraph companies, involving the same condition of the record as in this case:

Western Union Tel. Co. v. Lange, 248 Fed. 656, 664;

Pac. Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 910, where the Court said:

> "As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto, and sending the cause back for a new trial. In such cases the Court may direct the Circuit Court to enter such judgment as should have been entered under the

pleadings and findings. Ft. Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. 56.

"The judgment as entered by the Circuit Court is reversed, and the cause remanded to that Court, with direction to enter a judgment for the plaintiffs in that Court, against the defendant therein, for the sum of $3,704.37, and costs of suit, taxed at....."

In Swan v. Western Union Tel. Co., 129 Fed. 318, 323, the Circuit Court of Appeals for the Seventh Circuit, under like conditions, made the following order:

"The judgment of the Court below is reversed and judgment ordered in favor of the plaintiff in error for the sum of $1,050 with interest from the 2nd day of May, 1901, besides costs."

Under the Act of March 3, 1891, C. 517, Sec. 11, 26 Stat. 829, Comp. Stat. 1913, Sec. 1651, Barnes Fed. Code, Sec. 1407, 6 Fed. Stat. Ann., p. 234, the Circuit Court of Appeals is vested with power in a case tried without a jury, where the facts are undisputed to direct the entry of the proper judgment.

United States v. Illinois Surety Co., (C. C. A. 7th Cir.) 226 Fed. 653, 664. On the latter page, the Court said:

"It is, however, urged that, dealing with the case as an action at law, this Court is without power to modify the judgment of the District Court, and can only remand with directions to award a new trial. The objection is without merit. This Court is vested with power to

> modify, as well as to affirm or reserve, any judgment of the District Court (R. S. Sec. 701, Comp. St. 1913, Sec. 1669); Act March 3, 1891, c. 517, Sec. 11, 26 Stat. 829 (Comp. St. 1913, Sec. 1651) and in a case tried without a jury, where the findings of fact made by the Court are undisputed, as well as when they are agreed upon by the parties, as in Thomas v. Matthiessen, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. 577, the proper judgment may be rendered thereon in the appellate tribunal after a reversal of the judgment of the Trial Court. See, too, Ins. Co. v. Boykin, 12 Wall. 433, 20 L. Ed. 442; Ins. Co. v. Piaggio, 16 Wall. 378, 21 L. Ed. 358."

In Oliver v. Mt. Union Tanning & Extract Co., (C. C. A. 3d Cir.) 264 Fed. 601, 608, the Court on a "Petition for Limited Rehearing and Motion for Entry of Final Judgment," on page 608 said:

> "We have no doubt that we have the power to direct such a judgment to be entered as the pleadings and the special finding of facts of the Court below require. See, in addition to the cases cited in the opinion heretofore filed, Allen v. St. Louis Bank, 120 U. S. 20, 40, 7 Sup. Ct. 460, 30 L. Ed. 573; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; Redfield v. Parks, 132 U. S. 239, 252, 10 Sup. Ct. 83, 33 L. Ed. 327."

In Rathbone v. Board of Commissioners, (C. C. A. 8th Cir.) 83 Fed. 125, in a similar case the judgment of the lower Court was reversed and the cause remanded for a new trial.

A motion similar to the one in this case was filed

to modify the judgment. The Court on page 132 said:

> "Per Curiam. A motion has been made in this case to modify the judgment heretofore entered in this Court in pursuance of the opinion on file, and to modify the mandate to be issued thereunder so as to direct the Circuit Court to enter a judgment in favor of the plaintiff below, in lieu of granting a new trial. The motion is based on the ground that as a jury was duly waived, and the case was tried on an agreed statement of facts, and the damages recoverable are a liquidated sum, there is no occasion for a second trial. We are satisfied that the motion is well founded, on the following cases: Ft. Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. 56; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460; Rolling Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882; Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83; Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 733. Therefore, the judgment will be modified as prayed, and the Circuit Court will be directed to enter a judgment against the defendant county in the sum $3,831.60, with interest thereon at the rate of 6 per cent. per annum from July 1, 1894, to the date of entry."

In Fellman v. Royal Ins. Co., (C. C. A. 5th Cir.) 184 Fed. 577, the Court held:

> "Where, in an action on an award, pursuant to a fire policy, a reversal was required because of an error of the Trial Court in disposing of a question of law and there was no disputed question of fact in the case, the Court of Appeals would render final judgment, instead of remanding the cause for a new trial."

In the late case of Walker v. Gulf & I. Ry. Co., 269 Fed. 885, 891, advance sheets Apr. 7, 1921, the Circuit Court of Appeals of the Fifth Circuit, on page 891, said:

> "This case being tried by the Court, and the facts being agreed upon and specially found by the Court, there is no reason for remanding the case for a new trial; but the judgment rendered can be directed to be modified in accordance with the above ruling as to the advances made by the Railway to the Terminal Company. Fellman v. Royal Ins. Co., 184 Fed. 577, 106 C. C. A. 557; Fort Scott v. Hickman, 112 U. S. 150, 165, 5 Sup. Ct. 56, 28 L. Ed. 636."

The case of Bayne v. United States, (C. C. A. 8th Cir.) 195 Fed. 236, is very analogous to this case because there the erroneous construction of a contract caused the Court to make a finding of fact which was not correct. The Court of Appeals recognized the fact, as contended by the defendant in error here, that it was without power to find the facts, but held that it had power to correct the erroneous finding by correctly construing the contract and to render judgment accordingly, without a new trial.

In the case at bar there was no evidence introduced by defendant in the Court below to controvert plaintiff's proof and this proof with the admissions in the answer clearly established the allegation of the complaint. Consequently there was no necessity for special findings, the only questions being questions of law. Nevertheless, the Court, in his opinion, pur-

ported to make certain findings to which plaintiff was allowed exceptions both on the ground that they were not sustained by the evidence and were against law. Examples of such so-called findings are that the promise of defendant's district superintendent at Salt Lake to investigate and report, was made without waiving the defense that the claim was barred by the 60-day clause (Tr. p. 110). Plaintiff was allowed an exception on the ground that the finding was not supported by the evidence and is against law. The evidence on this point consisted of the letter written by Mr. Life, the district superintendent, and its construction was a question of law only. So it is with the statement of the Court on page 111, "that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram," etc. This was clearly a matter of law, since there was no dispute as to the facts. This is true of all the so-called findings. They amount merely to conclusions of law upon which this Court took a different view from that of the Court below.

For the foregoing reasons we submit that the judgment and order of this Court reversing the judgment of the District Court should stand, with directions to enter judgment in favor of plaintiff in error for forty-five hundred dollars ($4,500.00) and interest from December 1, 1917, which is the date plaintiff would have received the telegram and made the sale

of his stock, if the telegram had been sent and delivered.

Respectfully submitted,
RICHARD H. JOHNSON and
CAREY H. NIXON,
Attorneys for Plaintiff in Error.
Residence: Boise, Idaho.